Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States

JAMES CHANDLER,

Petitioner,

v.

SOUTH CAROLINA FARM BUREAU
INSURANCE COMPANIES,
A SOUTH CAROLINA CORPORATION,

Respondent.

On Petition For Writ of Certiorari
To The Supreme Court for the State of South Carolina

PETITION FOR WRIT OF CERTIORARI

JAMES CHANDLER
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QUESTION PRESENTED FOR REVIEW

DID THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA VIOLATE PETITIONER'S FEDERALLY-PROTECTED CONSTITUTIONAL RIGHTS BY REQUIRING PETITIONER'S EXPERT WITNESS IN A CIVIL CASE TO STATE THE FACTS SUPPORTING HIS CONCLUSIONS IN AN AFFIDAVIT FILED IN OPPOSITION TO A MOTION FOR SUMMARY JUDGMENT, WHEN NO OTHER LITIGANT'S EXPERT WITNESS IN THE STATE HAS EVER BEEN HELD TO SUCH PROCEDURAL STANDARD?

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption of the cover sheet to this Petition.

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CITATION OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

The opinion from the Supreme Court for the State of South Carolina is unpublished and is not included in any unofficial report. The official citation for the opinion from the Supreme Court of the State of South Carolina which is the subject of this Petition is *South Carolina Farm Bureau Insurance Companies, a South Carolina Corporation v. James Chandler*, Memorandum Opinion No. 2002-MO-048, said opinion is enclosed herein in the Appendix at pages A-1 through A-5. The order denying reconsideration of this opinion is included in the Appendix at page C-1.

The opinion from the Court of Appeals for the State of South Carolina is unpublished and is not included in any unofficial report. The official citation for the opinion from the Court of Appeals of the State of South Carolina which is the subject of this Petition is *South Carolina Farm Bureau Insurance Companies, a South Carolina Corporation v. James Chandler*, Memorandum Opinion No. 2000-UP-547, said opinion is enclosed herein in the Appendix at pages B-1 through B-6.

The order from the trial court is not included in any unofficial report. The trial court order which is the subject matter of this appeal is included herein in the Appendix at pages D-1 through D-2.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was filed by the Supreme Court for the State of South Carolina on June 6, 2002. *See* Appendix, A-1. The Order denying Petitioner's request for rehearing was entered by the Supreme Court for the State of South Carolina on July 10, 2002. As a result of Petitioner's Application for Extension of Time to File Petition for Writ of Certiorari, this Honorable Court granted Petitioner until November 7, 2002, to file said Petition for Writ of

Certiorari. The Order, No. 02A284, granting Petitioner an extension of time to file the Petition for Writ of Certiorari is dated October 2, 2002.

This Court has jurisdiction pursuant to 28 U.S.C.A. Section 1257, which allows the Court to review final decisions from the highest court of a state.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

This case involves principally the application of the Fourteenth Amendment to the United States Constitution, Section. This amendment provides, in pertinent part, the following: "Section 1. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws. . ." *See*, Amendment XIV, Section 1, United States Constitution.

STATEMENT OF THE CASE

This declaratory judgment action was commenced by Respondent South Carolina Farm Bureau Insurance Companies (hereinafter referred to as Farm Bureau) against Petitioner (hereinafter referred to as his Chandler) to declare its obligation to pay Chandler for the loss of his pickup truck which was destroyed by fire. Chandler answered and filed a counterclaim for bad faith failure to pay the claim. App. A-2.

The case was tried before The Honorable Paula H. Thomas and a jury commencing on January 12, 1998; however, the case ended in a mistrial. Thereafter, Judge Thomas granted Farm Bureau's Motion for Summary Judgment. App. D-1 through D-2. Petitioner appealed Judge Thomas' Order granting summary judgment to the Court of Appeals for the State of South Carolina.

By a per curiam unpublished opinion filed August 9, 2000, a panel of the Court of Appeals reversed and remanded Judge Thomas' order which granted Farm Bureau's Motion for Summary Judgment. App. B-1 through B-6. Subsequently, Farm Bureau was granted a Writ of Certiorari by the Supreme Court for the State of South Carolina.

By per curiam unpublished opinion filed on June 6, 2002, the Supreme Court for the State of South Carolina reversed the order of the Court of Appeals which had reversed and remanded the trial court's order granting Farm Bureau's Motion for Summary Judgment. App. A-1 through A-5. Chandler filed a Petition for Reconsideration with the Supreme Court for the State of South Carolina. App. E-1 through E-3. Three justices of the Supreme Court for the State of South Carolina denied Chandler's Petition for Reconsideration. However, Chief Justice Jean Toal dissented and stated that she would grant Chandler a rehearing. App. C-1.

Petitioner raised the federal question sought to be review by this Petition for Writ of Certiorari in his Petition for Reconsideration before the Supreme Court of the State of South Carolina. The State Supreme Court denied Chandler's Petition for Reconsideration. App. C-1.

ARGUMENT

This case was commenced as a simple declaratory judgment action and a counterclaim. It has mushroomed into a major travesty of justice that necessitates the invocation of this Court's jurisdiction and Petitioner final cry for justice. The South Carolina Court of Appeals gave Chandler his day in court by reversing and remanding his bad faith counterclaim back to the trial court. Without any basis in law or fact, the Supreme Court of the State of South Carolina saw fit to reverse the Court of Appeal. Despite Chief Justice Toal's recognition that Petitioner's case should be reheard, the majority of the State Supreme Court refused to right the wrong that was inflicted in this case. Based upon a thorough

search of the published opinions in the State of South Carolina, except for Petitioner's expert, no expert witness in the State of South Carolina has ever been required to disclose the facts underlying the expert opinion in order to successfully counter a motion for summary judgment. Therefore, Petitioner asserts that the Supreme Court of the State of South Carolina violated his rights as protected by the Fourteenth Amendment to the United States Constitution. In support of this contention, shows this Court the following:

As previously stated, the federal constitution provides that ". . . [n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws. . ." *See*, Amendment XIV, Section 1, United States Constitution (hereinafter referred to as the Fourteenth Amendment). Despite state justices' absolute immunity, this Court has recognized that a state's judicial branch can deprive a litigant of the rights protected under the Fourteenth Amendment. *See*, *Pulliam v. Allen*, 466 U.S. 522 (1984). Before this Court can determine whether the ruling of the Supreme of the South Carolina (hereinafter referred to as the State Supreme Court) has violated Petitioner's constitutional rights, it must review the rationale of the opinion which gave rise to this Petition for Writ of Certiorari. Thus, it is imperative that Petitioner discuss the lower supreme court's legal basis for its decision.

The State Supreme Court relied principally upon *Shupe v. Settle*, 315 S.C. 510 (S.C. App. 1994), in concluding that Robert Taylor's affidavit (Petitioner's expert) was not sufficiently supported by factual statements. Chandler contends that Taylor's affidavit is replete with factual assertions as held by the Court of Appeals. See, App. F-1 through F-2. However, for the purpose of this argument, Petitioner accepts the State Supreme Court's conclusion that Taylor's affidavit was not fact-specific, but even with this concession, Petitioner submits that State Supreme Court erred

in applying *Shupe* and the line of cases that have flowed from the *Shupe* holding. For example, *Shupe* held that a plaintiff cannot defeat a motion for summary judgment by relying upon the mere allegations of his complaint, but must disclose the facts he intends to rely on by affidavit or other proof)(citing *Dyer v. Moss*, 284 S.C. 208 (S.C. App. 1985) *Shupe*, 315 S.C. at 513-515 "A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment. *Shupe*, 315 S.C. at 516-517 (citing *Germann v. New York Life Ins. Co.*, 286 S. C. 34 (S.C. App. 1985). It is clear from the reading of *Shupe* that its holding does not apply to the affidavit or testimony of an expert witness. Moreover, *Shupe* and its line of cases pre-dated the application of the Rules of Evidence.

The South Carolina Rules of Evidence provides that expert "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704, SCRE; *see also*, *Knoke v. South Carolina Dep't of Parks, Rec. & Tourism*, 324 S.C. 136 (1996). Moreover, the form of an expert affidavit in defense to a summary judgment motion was recently addressed by the Court of Appeals in *Dawkins v. Fields*, 345 S.C. 23 (S.C. App. 2001).

In *Dawkins*, the trial judge refused to accept an expert's affidavit because the Defendant argued that it was not in proper form. 345 S.C. at 31. The Court of Appeals reversed the trial court and held as follows:

> We first note that, contrary to the defendant's contention, Professor Freeman's affidavit is based upon his personal knowledge. . . Our Rules of Evidence specifically permit the admission of an expert's opinion when it will assist the fact finder in understanding the evidence or determining a fact in issue [reference to footnote omitted]. **Moreover, an expert's otherwise admissible opinion is not inadmissible simply because it embraces the**

> **ultimate issue to be decided by the trier of fact [footnote omitted] OR SIMPLY BECAUSE IT EXPRESSES OPINIONS OR INFERENCES.**

Dawkins, 345 S.C. at 31 (emphasis added). Therefore, in accordance with Rules 704 and *Dawkins*, Petitioner's expert affidavit was proper as ruled by the South Carolina Court of Appeals. Like Freeman in *Dawkins*, Taylor ". . .utilized the information from the South Carolina Farm Bureau experts and his inspection of the vehicle. . ." App. E-1 through E-2. Based upon his investigation, Taylor's affidavit rendered an opinion that created a genuine issue of material fact concerning whether the fire was intentionally set. Even if Taylor's expert affidavit included only opinions or inferences, its admission was properly recognized by the South Carolina Court of Appeals when it reversed the trial court.

Despite the clear precedent established in the State of South Carolina, the State Supreme Court justices created a standard for an expert's affidavit that has been applied only to Petitioner's expert. The justices' action amount to a deprivation of Petitioner's fundamental rights to equal protection and due process.

REASONS WHY THIS WRIT SHOULD BE GRANTED

Petitioner has been denied access to the state court as a result of the State Supreme Court's dismissal of his lawsuit against Farm Bureau. Although this Petitioner raises a constitutional claim, the essence of Chandler's complaint is that he has been denied access to the state court by justices that are immune from damage suits. This Court recently recognized that it has not explored the full range of access-to-courts claim. *Christopher v. Harbury*, 01-394 (U.S. 2002). This case raises the novel issue of whether immunized state supreme court justices can violate a litigant's federally–protected rights by and access to the courts by deciding a case so shockingly contrary to precedent to invoke the jurisdiction of the United States Supreme Court. In light of this novel issue, the case jurisprudential significance on a national level.

To that end, this Court should exercise its discretion in granting the Petition for Writ of Certiorari.

CONCLUSION

Based upon the reasons stated above, the Court should grant Petitioner's Writ of Certiorari.

Respectfully submitted,

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Petitioner *Pro Se*

Dated: November 7, 2002

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Farm Bureau Insurance Companies, a South Carolina Corporation, Petitioner,

v.

James Chandler, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Williamsburg County
Paula H. Thomas, Circuit Court Judge

Memorandum Opinion No. 2002-MO-048
Heard May 14, 2002 - Filed June 6, 2002

REVERSED

William W. Doar, Jr., and D. Michael Henthome, of McNair Law Firm, P.A., of Georgetown, for petitioner.

William J. Barr, of Kingstree, for respondent.

PER CURIAM: The Court granted a writ of certiorari to review the decision of the Court of Appeals in South Carolina Farm Bureau Cos. v. Chandler, Op. No. 2000-UP-547 (S.C. Ct. App. filed August 9, 2000). We reverse.

Respondent James Chandler's (Chandler's) pickup truck was destroyed by fire. Chandler filed a claim with Petitioner South Carolina Farm Bureau Insurance Companies (Farm Bureau). Farm Bureau asserted the fire was intentionally set. It brought this declaratory judgment action against Chandler to determine whether insurance coverage existed. Chandler counterclaimed, alleging Farm Bureau acted in bad faith by denying coverage.

Farm Bureau filed a motion for summary judgment. After considering the parties' opposing affidavits, the trial judge concluded Farm Bureau did not act in bad faith by denying Chandler's claim and granted Farm Bureau's motion for summary judgment. Finding the parties' "conflicting affidavits create[d] a genuine issue of material fact as to whether Farm Bureau acted reasonably in denying Chandler's claim," the Court of Appeals reversed and remanded. Id.

ISSUE

Did the Court of Appeals err by holding Chandler's counteraffidavit created a genuine issue of material fact as to whether Farm Bureau acted in bad faith in denying his claim?

DISCUSSION

Farm Bureau contends the Court of Appeals erred by finding Chandler created a genuine issue of material fact through the affidavit of Robert Taylor. We agree.

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. SSI Medical Sews., Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990). In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the nonmoving party. Id.

Under Rule *56(c),* SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence

of a genuine issue of material fact. George v. Empire Fire and Marine Ins. Co., 344 S.C. 582, *545* S.E.2d 500 (2001). Once the moving party carries its initial burden, the "opposing party must, under Rule 56(e), 'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with specific facts showing that there is a *genuine issue for trial'.*" Id. at 592, S.E.2d at 505 (quoting Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991), quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. *574,* 586-87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, *552* (1986) (emphasis in original)).

The elements of an action for bad faith refusal to pay benefits under an insurance contract include: "(1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured." Cock-N-Bull Steak House. Inc. v. Generali Ins. Co., 321 S.C. 1, 6, 466 S.E.2d 727, 730 (1996) quoting Crossley v. State Farm Mut. Auto. Ins. Co 307 S.C. 354, *359-60,* 415 S.E.2d 393, 396-97 (1992). "An insured may recover damages for a bad faith denial of coverage if he or she proves there was no reasonable basis to support the insurer's decision to deny benefits under a mutually binding insurance contract." Cock-N-Bull Steak House. Inc. v. Generali Ins. Co., supra, quoting Dowling v. Home Buyers Warranty Cow., II, 303 S.C. *295,* 297, 400 S.E.2d 143, 144 (1991) (citing Varnadore v. Nationwide Mut. Ins. Co., 289 S.C. *155,* 345 S.E.2d 711(1986); Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 306 S.E.2d 616 (1983)).

In support of its motion for summary judgment, Farm Bureau presented the affidavit of its Special Investigator Jay Bruner. Bruner averred he visited the scene of the fire shortly after the fire occurred. He noted a "pour trail" leading into a

ditch. He examined the track and found "burn patterns on the hood. . . that did not correspond with the burn patterns on the underside of the hood." In addition, Bruner noticed blue paint on the passenger door, suggesting the door was open when the fire started.

Bruner stated he contacted Philip N. Kennedy, an independent fire investigator. Bruner attached Kennedy's report to his affidavit. The report stated the fire originated in the passenger compartment of the truck as a result of an intentional act. Kennedy's report referred to the report of Richard W. Henderson, Ph.D., who analyzed debris from the passenger compartment. The debris tested positive for gasoline.

Bruner further averred Farm Bureau had the truck's transmission inspected by an engineer. The engineer concluded the "fire was accelerant supportive from the exterior."

Finally, Bruner stated he interviewed Chandler. According to Bruner, Chandler stated he was alone in the truck when the fire occurred and the passenger door was closed. According to Chandler, at the time of the fire he was returning from picking up a paycheck; the check was destroyed in the fire. Further investigation, however, disclosed the check had cleared the bank several days before the fire.

Based on the totality of the evidence obtained during the investigation conducted within weeks after the fire, Bruner found it was reasonable to conclude the fire was intentionally, rather than accidentally, set.

By way of affidavit, Chandler's expert, Robert Taylor, averred he utilized information from Farm Bureau's experts and his own inspection to determine whether the fire was intentionally or accidentally set. Taylor stated:

> (a) That it was unreasonable for... Farm Bureau to have relied on their [sic] expert's conclusion that

the fire was intentionally set by the Chandlers due to the expert's reporting missing parts on the engine before the fire started when in fact the parts were not missing;[1]

(b) That it was unreasonable to rely on the fact that the vehicle was almost totally burned to conclude that the fire was intentionally set;

(c) That it was unreasonable to rely on the uneven color patterns on the hood to conclude that a flammable liquid was poured on the hood;

(d) That it was unreasonable to rely on weak traces of weathered gas in the gas sample to determine that the origin of fire was in the passenger compartment, because window glass was included in the sample taken from the passenger compartment;

(e) That it was unreasonable to rule out that the fire started in the exhaust area from leakage of transmission fluid onto exhaust system in light of the national recall by General Motors on vehicles like the Chandler's [sic] related to fires being caused by such leakage;

(f) That it was unreasonable to rely on experts finding of intentional burning of the vehicle due to a lack of concrete evidence of means and motive by the Chandlers.

Viewed in the light most favorable to Chandler, Taylor's affidavit does not create a genuine issue of material fact that Farm Bureau had no reasonable basis to deny Chandler's claim for the pickup truck. In essence, Taylor claimed Farm Bureau's expert's conclusion was either based on incorrect

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[1] At oral argument, Chandler asserted deposition testimony revealed Farm Bureau relied, in part, on engine parts missing from the truck, however, neither Bruner's affidavit nor the attached reports indicate missing engine parts.

facts or simply erroneous. Although he stated various aspects of Bruner's conclusion regarding the intentional setting of the fire were unreasonable, Taylor never explained *why* the conclusion was unreasonable. Rule 56(e), SCRCP (responsive affidavit must set forth *specific facts* showing genuine issue). Taylor's blanket assertion Bruner's conclusion was in error without any supporting reason or explanation does not create a genuine issue of material fact sufficient to overcome Farm Bureau's motion for summary judgment. Shupe v. Settle, 315 S.C. *510, 445* S.E.2d 651 (Ct. App. 1994) (conclusory statement as to ultimate issue in case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment). Because Chandler failed to establish a genuine issue concerning the reasonableness of Farm Bureau's claim denial, the Court of Appeals erred by reversing the order of the trial judge granting summary judgment.[2]

The decision of the Court of Appeals is REVERSED.

/s/ Jean ToalC. J.

/s/ James E. Moore J.

/s/ E. C. Burnett J.

/s/ Sidney F. Floyd A.A.J.

/s/ signature illegible A.

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[2] In light of our decision, we decline to address Farm Bureau's remaining issues.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Farm Bureau Companies, A South Carolina Corporation,

Respondent,

V.

James Chandler and Claudette Chandler,

Appellants.

Appeal From Williamsburg County
Paula H. Thomas, Circuit Court Judge

Unpublished Opinion No. 2000-UP-547
Heard June 5, 2000 - Filed August 9, 2000

REVERSED AND REMANDED

William J. Barr, of The Barr Law Firm, of Kingstree, for appellants.

William W. Doar, Jr., of McNair Law Firm, of Georgetown, for respondent.

PER CURIAM: James and Claudette Chandler appeal the trial court's grant of summary judgment in favor of South Carolina Farm Bureau Insurance Companies on the Chandlers' claim for bad faith failure to pay insurance proceeds. We reverse and remand.

SC FARM BUREAU COMPANIES V. CHANDLER
FACTS

On October 21, 1994, the Chandlers' Chevrolet pickup was burned beyond repair. The Chandlers filed a claim with Farm Bureau, which provided insurance coverage on the pickup, for the actual cash value of the vehicle. Farm Bureau contended the burning was the result of the intentional application of an incendiary device or substance. It brought a declaratory judgment action seeking a determination of whether coverage existed under the insurance policy. The Chandlers asserted the fire that burned the pickup was caused by a mechanical defect rather than by any fault of their own. They asserted counterclaims for breach of contract and bad faith.

A jury trial was held in January, 1998. After the close of the evidence, the trial judge granted Farm Bureau's motion for directed verdict on the Chandlers' claim for bad faith. During dosing arguments on the remaining issues, the Chandlers' attorney disobeyed the judge's instruction that he was not to argue to the jury that Farm Bureau had charged or accused his client of the crime of arson. The judge declared a mistrial based on the attorney's statements during dosing arguments. The written order declaring the mistrial did not mention the directed verdict previously granted on the bad faith claim.

Farm Bureau subsequently filed a motion for summary judgment on the bad faith claim. The judge granted the motion, stating she could not disregard the testimony she heard during the trial.

DISCUSSION

1. Mistrial

In South Carolina, it is well established that "[a] mistrial is the equivalent of no trial and leaves the cause pending in the circuit court." Grooms v. Zander, 246 S.C. 512, 514, 144 S.E. 2d 909, 910 (1965). A mistrial leaves the parties "as

though no trial had taken place." Id. The rulings of the trial court prior to the declaration of a mistrial do not effectuate a binding adjudication of the rights of the parties and are not directly appealable. Floyd v. Page, 124 S.C. 400, 117 S.E. 409 (1923).

In the present case, the order declaring the mistrial did not mention the directed verdict. The trial court never entered an order directing a verdict in favor of Farm Bureau on the bad faith claim. An order is not final until it is written and entered. Rule 58(a), SCRCP; see also Case v. Case, 243 S.C. 447, 134 S.E.2d 394(1964) (judgments in general, and divorce decrees in particular, are not final until written and entered); Bayne v. Bass, 302 S.C. 208, 394 S.E.2d 726 (Ct. App. 1990) (divorce decree is not final until written and recorded). Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly. First Union Nat'l Bank v. Hitman, Inc., 306 S.C. 327, 411 S.E.2d 681 (Ct. App. 1991), affd, 308 S.C. 421, 418 S.E.2d 545 (1992).

Although the trial court may have entered an order directing a verdict on the bad faith claim, it chose not to do so. We find the oral directed verdict did not constitute a final judgment. Accordingly, the trial court's ruling during the trial on the motion for directed verdict is not the law of the case. Furthermore, as the mistrial was the equivalent of no trial, we find the trial court erred in considering the testimony presented in the mistrial.

2. Affidavits

The Chandlers argue the trial court erred in considering Jay Bruner's affidavit in its consideration of the summary judgment motion.[1] We disagree.

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[1] The Chandlers also argue the trial court erred in considering trial counsel's affidavit. As the affidavit pertains to the directed verdict granted during the trial that ended in a mistrial, we find the affidavit irrelevant and do not address the trial court's acceptance of the affidavit.

The Chandlers assert the trial court erred in considering Bruner's affidavit that was not served until the day of the hearing. Farm Bureau produced Bruner's affidavit in response to the Chandlers' submission of the affidavit of their expert witness, Robert Taylor. Rule 6, SCRCP allows a moving party to serve reply affidavits at any time before the hearing commences. We find the trial court did not err in considering the affidavit.

3. Bad faith claim

The Chandlers assert the trial court erred in granting summary judgment to Farm Bureau on their bad faith claim. We agree.

Summary judgment is appropriate where it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Rule 56, SCRCP; Calvert v. House Beautiful Paint & Decorating Ctr., Inc., 313 S.C. 494, 443 S.E.2d 398 (1994). In deciding whether summary judgment is proper, the court should construe all inferences arising from the evidence against the moving party. Id. Summary judgment should be granted when plain, palpable and undisputed facts exist on which reasonable minds cannot differ. Trico Surveying Inc. v., Godley Auction Co., 314 S.C. 542, 481 S.E.2d 565 (1998).

The elements of a bad faith action are:

> (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits due under the contract; (8) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured.

Cock-N.Bull Steak House, Inc. v. General Ins. Co., 321 S.C. 1, 6, 466 S.E.2d 727, 780 (1996).

Bad faith is a knowing failure on the part of the insurer to exercise an honest and informed judgment in Processing a

claim. American Fire & Cas. Co. v. Johnson, 332 S.C. 307, 504 S.E.2d 356 (Ct. App. 1998) (citing 16A Appleman, Insurance Law and Practice Compensatory and Punitive Damages [section] 8878.25 (1981)). In order to recover damages, the insured must establish there was no reasonable basis to support the insurer's decision to deny benefits under a mutually binding insurance contract. Cock-N-Bull Steak House, Inc., 321 S.C. at 6, 466 S.E.2d at 730.

In his affidavit, Jay Bruner, a special investigator with Farm Bureau, described Ms investigation of the fire. He attached a report from Phillip N. Kennedy of Origin & Cause, Inc. in which Kennedy stated the fire started in the passenger compartment of the vehicle as a result of an intentional act. Kennedy reported fire debris from the floor board had tested positive for gasoline. Bruner stated an engineer who examined the truck's transmission also concluded that the fire was accellerant supportive from the exterior.

Bruner related inconsistencies between Ms own investigation and his interview with James Chandler. Although Bruner found the burn patterns indicated the right door was open when the fire started, Chandler told him the door was closed. In addition, Chandler told him that he was returning from Andrews where he had picked up a check when the fire started. Chandler told him the check had burned in the fire. Bruner discovered, however, that the check had cleared the bank several days before the fire. Based on Bruner's investigation the claim was denied.

The Chandlers' expert, Robert Taylor, asserted in an affidavit that it was unreasonable for Farm Bureau to determine that the fire had been intentionally set. Taylor stated Farm Bureau's expert reported parts of the engine were missing before the fire started when the parts were not missing. He contended it was unreasonable for Farm Bureau (1) to rely on the fact that the vehicle was almost totally burned to conclude that the fire was intentionally set, (2) to rely on the uneven color patterns to conclude that a flammable liquid was poured on the hood, (3) to rely on weak traces of

weathered gas to determine that the origin of the fire was in the passenger compartment, because window glass was included in the sample taken from the passenger compartment, and (4) to rule out the fire started in the exhaust area from leakage of transmission fluid onto the exhaust system in light of the national recall by General Motors on similar vehicles related to fires being caused by such leakage. Finally, Taylor asserted Farm Bureau acted unreasonably as there was no concrete evidence of means and motive for Chandler to set the fire.

The supreme court rejected an insurer's argument that from its own investigation, a reasonable basis was found to deny the claim, thereby entitling it to a directed verdict on the bad faith claim. Varnadore it. Nationwide Mut. Ins. Co.. 289 S.C. 155, 845 S.E.2d 711 (1986). The court explained,

> This position is not tenable. First, it binds the insured to the findings and conclusions of the insurer's own independent investigation; next, it effectually insulates the insurer from liability, and, finally, it forecloses a jury consideration of the insured's evidence of bad faith.

Id. at 158, 845 S.E.2d at 713.

The conflicting affidavits create a genuine issue of material fact as to whether Farm Bureau acted reasonably in denying the Chandlers' claim. Accordingly, we find the trial court erred in granting summary judgment to Farm Bureau on the bad faith claim.

REVERSED AND REMANDED.

HEARN, C.J., ANDERSON, and HUFF, JJ, concur.

C-1

(SEAL OF THE SUPREME COURT OF SOUTH CAROLINA NIL ULTRA)

THE SUPREME COURT OF SOUTH CAROLINA

DANIEL E. SHEAROUSE
CLERK OF COURT
POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

July 10, 2002

William Joseph Barr, Esquire
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Kingstree, SC 29556-3422

Re: SC Farm Bureau v. Chandler, James

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ James E. Moore J.

s/ E.C. Burnett. III J.

s/ Costa M. Pleicones J.

Justice John H. Wailer, Jr.,
not participating

I would grant Rehearing.

s/ Jean H. Toal C.J.

July 10. 2002."

The remittitur is today being forwarded to the lower court.

Very truly yours,

S/

CLERK

DES/dMh

cc: William W. Doar, Jr., Esquire
D. Michael Henthorne, Esquire

STATE OF SOUTH CAROLINA COUNTY OF WILLIAMSBURG South Carolina Farm Bureau Insurance Companies, a South Carolina Corporation Plaintiff, Versus James Chandler and Claudette Chandler, Defendant.	IN THE COURT OF COMMON PLEAS Filed: December 28, 1998 Clerk of Court Kingstree, SC Case No. 95 CP 45 142 ORDER FOR SUMMARY JUDGMENT AS TO DEFENDANTS' COUNTER-CLAIM PURSUANT TO RULE 56(b), SCRCP

This matter is before me on Motion of William W. Doar, Jr., Attorney for the Plaintiff, for Summary Judgment as to the Defendants' bad faith counterclaim. This Motion was argued before me on February 19, 1998, in the Williamsburg County Courthouse. Present and representing the. Plaintiff was William W. Doar, Jr. Present and representing the Defendants was William J. Barr. Both the plaintiff and Defendant submitted Affidavits which were considered by me in making this decision.

This case was tried before me on January 12 through 15, 1998, in the Williamsburg County Courthouse and resulted in a mistrial ordered on January 15, 1998. Prior to ordering the mistrial and at the close of all of the evidence, I directed a verdict in favor of the plaintiff on the Defendants' bad faith Counterclaim pursuant to Rule 50(a), SCRCP. It was my opinion that the only reasonable inference to be drawn from the evidence presented at trial was that the Plaintiff's

investigation of the fire which destroyed the Defendant's vehicle was prompt and thorough and its denial of Defendants' claim was reasonable. No appeal has been taken to the Direction of verdict.

After considering the Affidavits submitted by the Plaintiff and the Affidavit submitted by the Defendant as well as the argument of counsel, I am of the opinion that the Plaintiff's Motion for Summary Judgment should be granted. In addition, I cannot disregard the testimony which I heard during the trial of this case on January 12 through 15, 1998.

I FIND based on the totality of the evidence that the Plaintiff's investigation of this fire was prompt and reasonable.

I FURTHER FIND based on the totality of the evidence that the Plaintiff had a reasonable basis for denying this claim.

I FURTHER FIND based on the totality of the evidence that the Plaintiff did not act in bad faith and did not breach the covenant of good faith and fair dealings which it owed the Defendant under the terms of the insurance policy. Therefore, there being no genuine issue as to any material fact, the Plaintiff is entitled to judgment as a matter of law pursuant to Rule 56(b), South Carolina Rules of Civil Procedure.

AND IT IS SO ORDERED.

s/ Paula H. Thomas_____
Paula H. Thomas, Presiding Judge,
Third Judicial Circuit

March 3, 1998

E-1

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Honorable Paula H. Thomas, Circuit Court Judge

Opinion No. 2000-UP-547 (S.C. Ct. App.,
filed August 9, 2000)

South Carolina Farm Bureau Insurance Companies,
a South Carolina Corporation. . . . . .Petitioner,

v.

James Chandler and Claudette Chandler . . . . Respondents.

RESPONDENTS' PETITION FOR REHEARING

NOW COME RESPONDENTS, James and Claudette Chandler, by and through their attorney of record, pursuant to Rule 221(a), SCACR, petitioning the Court to rehear the above-referenced matter.

Respondents state with particularity the following points which have been overlooked or misapprehended by the Court:

1. The Court misapplied Shupe v. Settle, 315 S.C. 510 (S.C. App. 1994), to the expert affidavit of Robert Taylor. Shupe, which was decided before the South Carolina Rules of Evidence, applies only to lay

witnesses. Respondents submit that Taylor's affidavit is replete with factual assertions to support his conclusions. However, for the purpose of this argument, Respondents accepts the Court's conclusion that Taylor's affidavit is conclusory. As discussed in the accompanying Memorandum of Law, Taylor's affidavit is sufficient under Rules 703, 704, 705, South Carolina Rules of Evidence, because he was offered as an expert witness.

2. The Court erred in ordering a reversal in the case at bar. The proper remedy should have been a remand because Petitioner failed to appeal the portion of the Court of Appeals decision that deals with the mistrial and the portion of the opinion that held that the trial judge erred in considering improper matters. Moreover, a remand should have been granted because this Court was not in a position to consider the whole record that was before the trial judge, and because the affidavit of Jay Brunner was not signed or notarized—defective as a matter of law.

3. The Court's opinion in this case has the effect of creating new law in the State of South Carolina, and said new law was retroactively applied to the Respondents. For example, this Court has never held that an expert must provide all the facts upon which his opinion is based. Moreover, the Court's opinion in this case changes the application of the Rules of Evidence as they apply to the Chandlers. To that end, the Chandlers assert that the decision deprives them of fundamental fairness, in violation of the substantive due process and the equal protection clauses of the federal and state constitutions.

WHEREFORE, for the reasons stated herein, and based upon the authorities identified in the accompanying

Memorandum, Respondents request the Court to grant them the following relief:

a. For an order granting Respondents a rehearing in order to consider the Respondent's issues as raised in this Petition for Rehearing;

b. For an Order affirming the Court of Appeals order in the above-referenced case;

c. Alternatively, for an Order remanding the case to the trial court;

d. For such further relief this Court deems just and proper;

At Kingstree,

Dated: June 28, 2002

SCs/_____
WILLIAM J. BARR
the Barr Law Firm
108 North Academy Street
Kingstree, SC 29556
(843) 355-5444

Attorney for Respondents

STATE OF SOUTH CAROLINA COUNTY OF WILLIAMSBURG South Carolina Farm Bureau Insurance Companies, a South Carolina Corporation Plaintiff, Versus James Chandler and Claudette Chandler, Defendant.	IN THE COURT OF COMMON PLEAS Filed: February 17, 1998 Clerk of Court Kingstree, SC Case No. 95-CP-45-142 AFFIDAVIT

PERSONALLY appeared before me, Robert Taylor, who, after being duly sworn, states:

1. That he was hired as an expert to determine whether a fire of October 21, 1994, in the case of South Carolina Farm Bureau Insurance Company vs. James and Claudette Chandler was intentionally set by the Chandlers.

2. That in his investigation of this matter he utilized the information from the South Carolina Farm Bureau experts and his inspection of the vehicle as to whether the fire was intentionally or accidentally started.

3. That he testified in Court in this case when it commenced the week of January 12, 1998, and his opinions include but are not limited to the following:

   (a) That it was unreasonable for South Carolina Farm Bureau to have relied on their (sic)

expert's conclusion that the fire was intentionally set by the Chandlers due to the expert's reporting missing parts on the engine before the fire started when in fact the parts were not missing.

(b) That it was unreasonable to rely on the fact that the vehicle was almost totally burned to conclude that the fire was intentionally set.

(c) That it was unreasonable to rely on the uneven color patterns on the hood to conclude that a flammable liquid was poured on the hood.

(d) That it was unreasonable to rely on weak traces of weathered gas in the gas sample to determine that the origin of fire was in the passenger compartment, because window glass was included in the sample taken from the passenger compartment.

(e) That it was unreasonable to rule out that the fire started in the exhaust area from leakage of transmission fluid onto exhaust system in light of the national recall by General Motors on vehicles like the Chandler's related to fires being caused by such leakage.

(f) That it was unreasonable to rely on experts finding of intentional burning of the vehicle due to a lack of concrete evidence of means and motive by the Chandlers.

February 17, 1998 s/ Robert Taylor

(Affiant)

SWORN TO AND SUBSCRIBED before me by the above name (sic) affiant this 17th day of February, 1998 (sic) to certify which, witness my hand and seal of office.

s/ Pamela K. Kean

NOTARY PUBLIC IN AND FOR
THE STATE OF SOUTH CAROLINA

I, Robert K. Taylor, acknowledge receipt of a copy of this Affidavit on this day.

s/ Robert Taylor

FILED
NOV 25 2002

No. 02-721

In The

Supreme Court of the United States

JAMES CHANDLER,

Petitioner,

v.

SOUTH CAROLINA FARM BUREAU INSURANCE COMPANIES, A SOUTH CAROLINA CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court For The State Of South Carolina

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The Petition for Writ of Certiorari should be denied because the federal question sought to be reviewed was never presented to nor passed on by the state trial court, the state Court of Appeals or the state Supreme Court. *Mishkin v. New York*, 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958; *Walters v. City of St. Louis*, 347 U.S. 231, 96 L.Ed. 660, 74 S.Ct. 505 (1954); *Norton v. Opening Break of Aiken*, 319 S.C. 469, 462 S.E.2d 861 (S.C. 1995).

STATEMENT OF CASE

South Carolina Farm Bureau Insurance Companies (Farm Bureau) brought a Declaratory Judgment action against Petitioner, James Chandler (Chandler) to determine its responsibility to pay a fire loss claim submitted by Chandler. After an investigation, Farm Bureau concluded that the Chandler pickup truck had been intentionally burned. The claim was denied and the Declaratory Judgment action was commenced. Chandler answered and alleged a counterclaim for bad faith failure to pay his insurance claim.

The case was tried before The Honorable Paula H. Thomas and a jury on January 12, 1998 to January 15, 1998. At the conclusion of Farm Bureau's case, Judge Thomas granted Farm Bureau's Motion for directed verdict and dismissed Chandler's bad faith counterclaim. During closing argument, Chandler's trial attorney made comments to the jury in violation of Judge Thomas' prior instructions, and she *sua sponte* declared a mistrial on January 15, 1998. Robert Taylor testified at trial as Chandler's expert witness. Because of the mistrial, the case was put over for trial for a later term.

Thereafter, and before trial, Farm Bureau made a Motion for Summary Judgment pursuant to Rule 56(b),

South Carolina Rules of Civil Procedure, seeking dismissal of the bad faith counterclaim. Farm Bureau submitted affidavits in support of its positions. Chandler submitted the affidavit of Robert Taylor. App. F-1 through F-3. Judge Thomas, the trial judge, granted the Motion thereby dismissing the bad faith counterclaim. App. D-1 through D-2. The South Carolina Court of Appeals, an intermediate appellate court, on August 9, 2000, reversed the trial judge thereby restoring the bad faith counterclaim. App. B-1 through B-6. On appeal to the South Carolina Court of Appeals, Chandler did not raise the federal question he now raises before this Court. The South Carolina Supreme Court on June 6, 2002 reversed the Court of Appeals thereby again dismissing the bad faith counterclaim. Again, Chandler failed to raise the question presented in Chandler's Writ for Certiorari. App. A-1 through A-6. A Motion for Rehearing (App. E-1 through E-3) was denied. Then, having failed to raise the issue at any level below and having lost his appeal before the highest court in South Carolina, Chandler, for the first time, and in violation of the South Carolina Rules of Appellate Procedure, raised his federal issue. App. C-1 through C-2. The Declaratory Judgment action is pending.

REASONS WHY THIS WRIT SHOULD BE DENIED

Supreme Court Rule 14.1(g)(i) requires that a Petition for a Writ of Certiorari include a statement setting forth when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts. Chandler acknowledges in his Petition that the federal question sought to be reviewed was raised for the first time on or about June 28, 2002 when he filed a Petition for Rehearing with the South Carolina Supreme Court after an adverse

decision. The Petition for rehearing was denied (Petitioner's Statement of Case, pg. 3). Farm Bureau submits that attempting to raise a federal question at this final and purely discretionary stage of the state proceedings fails to preserve the federal question for review by this Court.

Farm Bureau further submits that a party, having failed to plead or raise a federal question in the state trial and intermediate appellate court, should not be allowed to raise that question for the first time in a petition for rehearing addressed to the state court of last resort.[1] If that were allowed, the concept of preservation of error would be meaningless.

Farm Bureau further submits that the opinion of the South Carolina Supreme Court in the case of *South Carolina Farm Bureau Insurance Companies v. James Chandler*, 2002-MO-048 (2002) is sound and is based on South Carolina Rules of Civil Procedure and past precedents. Chandler's argument that the holdings in *South Carolina Farm Bureau Insurance Companies v. James Chandler, supra,* is inconsistent or contrary with the holdings in *Dawkins v. Fields*, 345 S.C. 23, 545 S.E.2d 515 (S.C. App. 2001) is without merit for the following reasons:

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[1] South Carolina Appellate Court Rule 221(a) governs rehearings and reads in part: "Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the Court. A petition for rehearing shall be in accordance with Rule 224, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court." Farm Bureau submits that Rule 221(a) does not permit new issues to be raised in a petition for rehearing. *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (S.C. 2000) (An issue cannot be raised for the first time on appeal, but must be raised and ruled upon by the trial court to be preserved for appellate review.)

1. Although Farm Bureau finds no real problem with the holding in *Dawkins v. Fields, supra,* that case is the opinion of an intermediate appellate court, not the court of last resort in the State of South Carolina.

2. Rule 56(e), SCRCP, provides in part: "Supporting and opposing affidavits shall be made on personal knowledge, *shall set forth such facts as would be admissible in evidence*, and show affirmatively that the affiant is competent to testify to the matters stated therein." (emphasis added). The summary judgment rule clearly requires that supporting and opposing affidavits must include *admissible facts* and not merely opinions, inferences, or conclusions (emphasis added). *See Allen v. Coughlin*, 64 F3d 77 (2nd Cir. 1995) (conclusory affidavit insufficient).

   In the case of *Dawkins v. Fields, supra*, the South Carolina Court of Appeals found that the affidavit of the expert witness " . . . contains numerous fact-based opinions that constitute admissible evidence." 545 S.E.2d at 519. This opinion is consistent with the fact requirement of Rule 56(e), SCRCP. However, the South Carolina Supreme Court found that the affidavit of Robert Taylor failed to include specific facts why Farm Bureau's findings that Chandler's pickup truck had been intentionally burned were unreasonable. App. A-6.

3. Rule 704, SCRE, does allow expert testimony as to the ultimate issue. However, that Rule also requires that the opinions or inferences testified to by an expert witness be "otherwise admissible." Therefore, the affidavit of an expert in support of or in opposition to a motion for summary judgment to be "otherwise admissible" must also "set forth such facts as would be admissible in evidence . . . ".

Rule 56(e), SCRCP. *U.S. v. Various Slot Machines on Guam*, 658 F2d 697 (9th Cir. 1981). The South Carolina Supreme Court found that the affidavit of Robert Taylor did not set forth such facts.[2]

CONCLUSION

Since the Petitioner failed to timely raise a federal question and since the case of *South Carolina Farm Bureau Insurance Companies v. James Chandler, supra,* is not contrary to existing South Carolina Rules of Procedure and past precedents, this Petition for a Writ of Certiorari is without merit and should be denied.

Dated at Georgetown, S. C., this 25th day of November, 2002.

Respectfully submitted,

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[2] In addition to obtaining only conclusory opinions, the affidavit of Robert Taylor failed to establish (1) his expertise or qualifications as an expert, and (2) Chandler's damages that are an essential element of the cause of action of bad faith refusal to pay an insurance claim. *Cock-N-Bull Steak House, Inc. v. Generali Insurance Co.*, 321 S.C. 1, 466 S.E.2d 727 (S.C. 1996). Therefore, having failed to establish Taylor's expertise, his opinions were inadmissible as an expert opinion. Also, having failed to establish damages, an essential element of his claim, the entry of summary judgment was appropriate.